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Supreme Court of the United States

STATE OF CALIFORNIA EX REL.
EDMUND G. BROWN JR., ATTORNEY GENERAL,

Cross-Petitioner,

v.

CORAL POWER, L.L.C., et al.,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a tariff which contains no ascertainable rates, just a statement that rates will be determined "by agreement," coupled with post-performance reporting of the rates charged, produces valid filed rates under the Federal Power Act and this Court's decisions in *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994), and *Maislin Industries U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990).

LIST OF PARTIES

Cross-Petitioner State of California ex rel. Edmund G. Brown Jr., Attorney General, initiated the proceedings below by filing a complaint with the Federal Energy Regulatory Commission ("FERC"), and petitioned the Ninth Circuit Court of Appeals for review of FERC's orders.

The following cross-respondents were intervenors in the Ninth Circuit:

AES Delano, Inc. (f/k/a Delano Energy Company, Inc.)
AES Placerita, Inc.
Arizona Public Service Company
Avista Corporation
Avista Energy, Inc.
BP Energy Co.
Cabrillo Power I LLC
Cabrillo Power II LLC
City of Tacoma, Washington
Coral Power LLC
Duke Energy North America, LLC
Duke Energy Trading and Marketing, LLC
Dynegy Power Marketing, Inc.
El Paso Merchant Energy, L.P.
El Segundo Power, LLC
Enron Energy Services, Inc.
Enron Power Marketing, Inc.
Long Beach Generation LLC
Mirant Americas Energy Marketing, Inc.
Mirant California, LLC
Mirant Delta, LLC
Mirant Potrero, LLC
Morgan Stanley Capital Group, Inc.
Mountainview Power Co.
Pacificorp
Pacificorp Power Marketing, Inc.

LIST OF PARTIES – Continued

Pinncale West Capital Corp.
Portland General Electric Company
Powerex Corporation
PPL Energy Plus, LLC
PPL Montana, LLC
Public Service Company of Colorado
Public Service Company of New Mexico
Puget Sound Energy, Inc.
Reliant Energy Services, Inc.
Riverside Canal Power Co.
Sempra Energy Trading Corp.
Sempra Energy Solutions, LLC
(f/k/a Sempra Energy Solutions)
Sempra Generation (f/k/a Sempra Energy Resources)
Strategic Energy LLC
TransAlta Energy Marketing (California) Inc.
TransAlta Energy Marketing (U.S.) Inc.
TransCanada Energy Ltd.

Cross-respondent Federal Energy Regulatory Commission was the respondent in the Ninth Circuit.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

The State of California *ex rel.* Edmund G. Brown Jr., Attorney General, respectfully submits this cross-petition for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS AND ORDERS ENTERED BELOW

The Ninth Circuit's opinion is reported at 383 F.3d 1006 (2004). *See* Petitioners' Appendix ("Pet. App.") at 1a-19a. FERC's orders are reported at 99 FERC ¶ 61,247, *rehearing denied*, 100 FERC ¶ 61,295 (2002). Pet. App. at 20a-79a.

JURISDICTION

The Ninth Circuit entered its judgment on September 9, 2004, and denied rehearing on July 31, 2006. Petitioners sought and obtained an extension of time for filing a petition for a writ of certiorari until December 28, 2006. The petition was filed on December 28, 2006, and placed on the Court's docket on January 4, 2007, under case number 06-888. The California Attorney General's cross-petition is timely filed under Rule 12.5 of the Court's rules. The Court has jurisdiction under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Power Act, 16 U.S.C. § 791a *et seq.*, and the Natural Gas Act, 15 U.S.C.

§ 717 *et seq.*, are reproduced in the appendix to the petition. Pet. App. at 82a-95a. Relevant provisions of the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.*, and the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, are reproduced in the appendix to this cross-petition.

STATEMENT

The California Attorney General incorporates by reference the statement of the case set forth in his brief in opposition in No. 06-888.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

A. If The Writ Issues, The Court Should Also Grant The Cross-Petition To Ensure Adequate Consideration Of The Petition Itself, And To Avoid Risking A Decision That Conflicts With Well-Settled Law.

As explained in the California Attorney General's brief in opposition in No. 06-888, the petition for a writ of certiorari filed by Coral Power L.L.C., et al. should be denied. If the Court were to grant the petition, however, it should also grant this cross-petition.

Petitioners claim, in essence, that the Ninth Circuit's decision vitiates the filed rate doctrine. That claim assumes that the filed rate doctrine applies in the first instance. The filed rate doctrine does not apply here, however, because petitioners did *not* file their rates.

The text and legislative history of the Federal Power Act ("FPA") and this Court's decisions in *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994), and *Maislin Industries U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), directly conflict with petitioners' notion that a "market-based rate tariff," which states only that rates will be determined "by agreement," constitutes a lawful filed rate. Indeed, Section 205 of the FPA, 16 U.S.C. § 824d, read together with *the MCI* and *Maislin* decisions, compels the conclusion that FERC's filing requirements for market-based rates violate the FPA *per se*. Because rates were not – and could not have been – properly filed under any theory, the filed rate doctrine does not pose a bar to refund claims in this case.

For these reasons, if the Court grants review, it should also grant the cross-petition. The Court should not simply assume, without directly deciding, that the filed rate doctrine applies here because public utilities have no "contractual reliance interests," Petition at 2, in rates they failed to file as required by Section 205. *See Security Services, Inc. v. K Mart Corp.*, 511 U.S. 431, 440-43 (1994). Similarly, if petitioners did not satisfy the statutory requirement for prior notice and filing, there is no possibility that FERC could "impose retroactive refunds not contemplated by Congress," Petition at 2, because the filed rate doctrine only bars retroactive changes to "properly filed" rates. *Arkansas Louisiana Gas Co. v. Hall* ("*Arkla*"), 453 U.S. 571, 577 (1981).[1] Thus, the court should grant the

[1] *Arkla* involved the cognate provisions of the Natural Gas Act ("NGA"). This cross-petition follows the Court's "established practice of citing interchangeably decisions interpreting the pertinent sections" of the NGA and the FPA. *Arkla*, 453 U.S. at 577 n.7.

cross-petition to avoid glossing over an essential predicate to the petition itself.

More importantly, granting review without addressing whether rates were properly filed in the first instance could undermine this Court's decisions in *MCI* and *Maislin* and unsettle the law in this area. The Ninth Circuit tried to distinguish *MCI* and *Maislin* in an attempt to reconcile FERC's market-based rate regime with the statutory scheme. Pet. App. at 10a-11a. But the court's conclusion that quarterly, post-performance reporting of rates cures the failure to file rates in advance runs directly contrary to *MCI* and *Maislin* and the FPA itself. Thus, the Court should grant the cross-petition to avoid any suggestion that it is retreating from its long-standing interpretation of the statutory filing requirement and the filed rate doctrine.

In sum, if the Court decides to wade into this controversy – and the California Attorney General believes review is unwarranted – it should take a comprehensive approach. Any examination should include both the question presented by the petition and the assumption on which it is based.

B. The Plain Wording Of Federal Power Act Section 205 And This Court's Decisions In *MCI* And *Maislin* Make Clear That A Market-Based Rate Tariff Fails, As A Matter Of Law, To Produce Valid Filed Rates.

As discussed above, the petition rests on an assumption that market-based rate tariffs produce valid filed rates. Yet that assumption directly conflicts with the plain wording of Section 205 of the FPA, 16 U.S.C. § 824d, and this Court's decisions in *MCI*, 512 U.S. 218, and *Maislin*,

497 U.S. 116, as well as numerous circuit court decisions interpreting the FPA and related statutory schemes.

1. A tariff which states only that rates will be determined "by agreement," and which contains no ascertainable rates, violates the FPA Section 205 requirement that utilities file schedules "showing all rates and charges for any transmission or sale subject to the jurisdiction of [FERC]." 16 U.S.C. § 824d(c)-(d).

Under the FPA, rates cannot be made effective and binding on purchasers in the absence of a filing that specifies the "rate itself." *Electrical Dist. No. 1. v. FERC*, 774 F.2d 490, 492-93 (D.C. Cir. 1985) (Scalia, J.); *see also Pub. Serv. Co. of New Mexico v. FERC*, 832 F.2d 1201, 1223-25 (10th Cir. 1987) (same); *Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135, 1141 (D.C. Cir. 1987) (same).[2]

This rule applies not just under the FPA, but across regulated industries. *See Southwestern Bell Corp. v. FCC*, 43 F.3d 1515, 1521 (D.C. Cir. 1995) (under the Communications Act of 1934 ("CA"), 47 U.S.C. § 203(a)-(b)(1) (2001), a valid tariff must allow the public to "discern the actual rate proposed to be charged. . . ."); *Regular Common Carrier Conference v. U.S.*, 793 F.2d 376, 379-80 (1986) (Scalia, J.) (under the Interstate Commerce Act ("ICA"), 49 U.S.C. § 10762(a)(1) (1994), a tariff "produces a filed rate"

[2] FERC has allowed the use of "formula rates" in certain circumstances, and Congress amended Section 205 to permit the use of a certain type of formula rate known as an "automatic adjustment clause." 16 U.S.C. § 824d(f). Market-based rates are not formula rates, however, as FERC expressly held in this case. *E.g.*, Pet. App. at 40a. And Congress has not amended Section 205 to allow the use of market-based rate tariffs.

only if it states the rate itself, or at least enables the public to determine "how the per-unit rate is determined, enabling them to protest the application").[3]

"The filing requirement, in the first instance, is a notice requirement." *Boston Edison Co. v. FERC*, 856 F.2d 361, 368 (1st Cir. 1988). And the statute specifies what a valid tariff must contain: "all rates" for "any" sale of wholesale power. 16 U.S.C. § 824d(c)-(d). A tariff stating only that a utility's rates will be determined "by agreement" does not pass muster.

Indeed, the D.C. Circuit has ruled that a tariff which contains "nothing more than an offer to negotiate" – like petitioners' market-based rate tariffs – does not produce a filed rate. *Regular Common Carrier Conference*, 793 F.2d at 380; *see* Richard Stavros, *Lost in Translation*, PUBLIC UTILITIES FORTNIGHTLY, June 1, 2004, at 4 (the California Attorney General "argues a valid point: that there really is no 'filed rate' ").

If a market-based rate tariff were, as petitioners contend, a lawful filed rate, sellers could make any number of separate sales to individual buyers at widely

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[3] Courts have long noted that the FPA, the ICA, and the CA provide for "essentially the same form of regulation, the term 'common carrier' being generally used of firms providing transportation or communications and 'public utility' of firms providing electricity or gas. . . ." *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 487 (7th Cir. 1998) (Posner, C.J.); *see also, e.g.*, *Northwestern Pub. Serv. Co. v. Montana-Dakota Utils. Co.*, 181 F.2d 19, 22 (8th Cir. 1950) (holding that the FPA was modeled on the ICA, so "decisions under the latter Act should be controlling here"), *aff'd sub nom. Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951); *American Tel. & Tel. Co. v. FCC*, 487 F.2d 865, 877 (2d Cir. 1973) (noting similarity between rate filing provisions in the NGA and the CA, both of which were modeled on the ICA).

varying prices, without having to individually file their rates under Section 205(d). 16 U.S.C. § 824d(d). *But see Sun Oil Co. v. FPC*, 281 F.2d 275, 278 (5th Cir. 1960) (holding that a rate "change" necessarily occurs "where a contract has, by its terms, expired, and a new contract has been made between the same parties without substantial difference except as to rates"). Such an approach would abrogate the statutory mandates for advance notice of all proposed rates, 16 U.S.C. § 824d(d), and for agency review of proposed rates before they take effect, 16 U.S.C. § 824d(e), and cannot be sustained under the statute or this Court's decisions in *MCI* and *Maislin*.[4]

2. *MCI* and *Maislin* directly conflict with the assumption, integral to the petition, that utilities charged lawful filed rates during the energy crisis. In *MCI*, 512 U.S. 218, the Federal Communications Commission ("FCC") tried to defend a scheme in which "non-dominant" long-distance carriers were permitted to file tariffs at their option. The FCC sought to ensure "just and reasonable" rates by dispensing with rate filings, and instead deciding in advance that a given carrier or class of carriers were

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[4] It makes no difference that petitioners' market-based rate tariffs were accepted for filing without being suspended. *See* Petition at 17-18. In *Security Services*, 511 U.S. at 433, the tariff at issue was "received, accepted, and filed, and never rejected by the ICC." Nonetheless, the Court held the tariff could not be enforced because it failed the "fundamental purpose of tariffs; to disclose the [rates] due to the [utility]." *Id.* at 437. Similarly, petitioners did not file their rates in tariffs (and they did not report their rates after-the-fact, either). Therefore, petitioners cannot invoke the filed rate doctrine as a bar to refund claims in this case. *Id.* at 440-43; *see also, e.g., In re Olympia Holding Corp. v. Frito-Lay, Inc.*, 88 F.3d 952, 961 (11th Cir. 1996) (holding that an otherwise binding tariff which does not give adequate notice of rates is void *ab initio*).

incapable of exercising market power. *Id.* at 221-22. This Court held the scheme violated the text and structure of the FCC's controlling statute because, among other reasons, it provided no means for the public to assert its right to challenge proposed rates under CA Section 204, 47 U.S.C. § 204(a)(1) (2001), which is substantially identical to FPA Section 205(e), 16 U.S.C. § 824d(e). 512 U.S. at 230-31.

MCI followed this Court's earlier decision in *Maislin*, 497 U.S. 116. *Maislin* involved an Interstate Commerce Commission ("ICC") policy allowing common carriers operating in competitive markets to charge privately negotiated, unfiled rates that were lower than rates already on file for the same service. 497 U.S. at 121-22. The ICC argued that "in light of the more competitive environment, strict adherence to the filed rate doctrine is inappropriate and unnecessary. . . ." *Id.* at 134. The Court rejected that argument, holding that compliance with statutory filing requirements is "utterly central to the administration of the [ICA] . . . Without these provisions, it would be monumentally difficult to enforce the requirement that rates be reasonable and non-discriminatory. . . ." *Id.* at 132 (quoting *Regular Common Carrier Conference,* 793 F.2d at 379). More specifically, allowing common carriers to charge privately negotiated, unfiled rates made it "virtually impossible for the public to assert its right to challenge the lawfulness of . . . proposed rates"). *Id.*[5]

[5] This Court expressed "considerable sympathy" with arguments that the rate filing requirement stifles competition. *MCI*, 512 U.S. at 233. But the Court made clear that, "[f]or better or worse, the Act establishes a rate-regulation, filed-tariff system. . . ." *Id.* at 234. It further held that requiring utilities to file their rates in tariffs was "Congress's chosen means of preventing unreasonableness and discrimination in charges," *id.* at 230, and that administrative agencies are "bound, not

(Continued on following page)

FERC's market-based rate regime cannot be distinguished from the FCC's "Permissive Detariffing" rule or the ICC's "Negotiated Rates Policy." There is no meaningful distinction between filing no tariff, on the one hand, and filing a tariff stating only that rates will be determined "by agreement," on the other. Neither FERC nor the public has any advance notice of how much the utility intends to charge any given customer under any given set of market conditions, nor any way to ensure the utility will adhere to the rates supposedly "pre-authorized" (several years in advance and sight unseen) by FERC. *See* Pet. App. at 53a.

After this Court's decision in *MCI*, Congress gave the FCC forbearance authority with respect to the filing requirement, and the FCC prohibited "non-dominant" long-distance carriers from filing tariffs. *See generally MCI Worldcom, Inc. v. FCC*, 209 F.3d 760, 762-63 (D.C. Cir. 2000). Similarly, after this Court's decision in *Maislin*, Congress abolished the ICC and, along with it, the filing

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only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *Id.* at 231 n.4.

Accordingly, cases purportedly holding that competitive market forces can produce "just and reasonable" rates, *see* Petition at 5 n.5 (citing cases), do not control the foundational issue presented by the petition, which is whether market-based rate tariffs produce valid filed rates. Indeed, under *MCI* and *Maislin*, FERC's prior determinations that petitioners and others were incapable of exercising market power, *see* Petition at 18, are "ultimately irrelevant" to whether they charged lawful filed rates during the energy crisis. *Southwestern Bell*, 43 F.3d at 1520.

This Court and others have made clear that the critical inquiry is whether a tariff provides adequate notice of the applicable rate. A market-based rate tariff, however, is a blank slate. There is no filed rate that can be challenged before it takes effect, and no filed rate that can be enforced after it takes effect.

requirement for most segments of the trucking industry. *See generally Olympia Holding Corp.*, 88 F.3d at 955. Congress, however, has not abolished or relaxed the FPA's rate filing requirement, other than to permit the use of automatic adjustment clauses, 16 U.S.C. § 824d(f), which are not at issue here. Unlike the FCC, FERC has no authority to eliminate the filing requirement for utilities deemed to lack market power.

3. The Ninth Circuit rejected the California Attorney General's argument that FERC's filing requirements for market-based rates violate the FPA *per se*. Pet. App. at 12a. But its attempts to reconcile the market-based rate regime with Section 205, and to distinguish *MCI* and *Maislin*, do not succeed. *See* Pet. App. at 10a-11a (holding that the "crucial difference between *MCI*/*Maislin* and the present circumstances is the dual requirement of an ex ante finding of the absence of market power *and* sufficient post-approval reporting requirements") (emphasis in original).

Contrary to the Ninth Circuit's decision, FERC's authority to determine the "form" of "schedules showing all rates," 16 U.S.C. § 824d(c)-(d), does not extend so far as to permit the use of schedules showing no rates at all. Pet. App. at 11a. FERC has some authority to prescribe the contents of filed tariffs, *MCI*, 512 U.S. at 234; *see also, e.g.*, *City of Cleveland v. FERC*, 773 F.2d 1368 (D.C. Cir. 1985) (Scalia, J.),[6] but it cannot eliminate the express requirement that tariffs filed under Section 205 show all rates for

[6] The court held there that FERC has discretion to determine which "practices ... affecting such charges and rates," 16 U.S.C. § 824d(c)-(d), must be filed in tariffs. 773 F.2d at 1372.

each and every sale of wholesale power. *See United Gas Pipeline Co. v. Mobile Gas Serv. Co.*, 350 U.S. 332, 339 (1956) (holding that "individual contracts . . . must be filed with the Commission and made public"). As this Court held in *Maislin*, 497 U.S. at 135, an agency has no power to "adopt a policy that directly conflicts with its governing statute."

Further, contrary to the Ninth Circuit's decision, FERC's authority to prescribe the time in which rates must be filed, 16 U.S.C. § 824d(c), does not convert petitioners' market-based rate tariffs to valid filed rates, on the theory that post-performance, transaction-specific reporting "completes" the filing. Under Section 205 and FERC's own regulations, all rates must be filed at least sixty days "*in advance* of the commencement of jurisdictional service." *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at p. 61,173 (1993) (emphasis added).

Further, if sellers could publicize their rates months after charging and collecting them, the public would have no means of challenging rates *before* they take effect under Section 205(e). 16 U.S.C. § 824d(e). As this Court held in *MCI*, 512 U.S. at 230-231, such a scheme cannot be reconciled with the text, structure, or legislative history of the FPA. There is no way to suspend and thereby "defer the use" of a rate several months *after* it has been charged and collected. 16 U.S.C. § 824d(e); *see also, e.g., Maislin*, 497 U.S. at 132 (holding that "the ICC cannot review in advance the reasonableness of *unfiled* rates") (emphasis in original).

For this reason, the scheme violates the FPA, regardless of whether post-performance, quarterly reporting is

viewed as an "integral part" of a seller's filed rate, as the Ninth Circuit held, Pet. App. at 15a, or merely as an "informational" requirement, as petitioners contend. The procedures established by Congress for reviewing the legality of proposed rates expressly require advance filing, and cannot function properly without advance filing. *See* 16 U.S.C. § 824d(d) (requiring sixty days notice before proposed rates may go into effect); *id.* at § 824d(e) (authorizing FERC to "suspend" and thereby "defer the use" of proposed rates for up to five months beyond the time they would otherwise go into effect). FERC has no authority to eliminate the FPA Section 205 requirement that rates be filed in advance on the grounds that a public utility may be incapable of exercising market power.

For the foregoing reasons, granting review without granting the cross-petition could risk a decision that conflicts with *MCI*, *Maislin*, and the FPA itself.

CONCLUSION

If the Court were to grant the petition, it should also grant the California Attorney General's cross-petition.

Dated: February 5, 2007

Respectfully submitted,

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47 U.S.C. § 203. Schedules of charges

(a) Filing; public display

Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) Changes in schedule; discretion of Commission to modify requirements

(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

* * *

47 U.S.C. § 204. Hearings on new charges; suspension pending hearing; refunds; duration of hearing; appeal of order concluding hearing

(a)(1) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or a revised charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or revised charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or revised charge as by its decision shall be found not justified. At any hearing involving a new or revised

charge, or a proposed new or revised charge, the burden of proof to show that the new or revised charge, or proposed charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

(2)(A) Except as provided in subparagraph (B), the Commission shall, with respect to any hearing under this section, issue an order concluding such hearing within 5 months after the date that the charge, classification, regulation, or practice subject to the hearing becomes effective.

(B) The Commission shall, with respect to any such hearing initiated prior to November 3, 1988, issue an order concluding the hearing not later than 12 months after November 3, 1988.

(C) Any order concluding a hearing under this section shall be a final order and may be appealed under section 402(a) of this title.

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49 U.S.C. § 10762. General tariff requirements

(a)(1) A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year or a motor carrier of property providing transportation under a certificate to which the provisions of section 10922(b)(4)(E) of this title apply or under a permit to which the provisions of section 10923(b)(5) of this title apply may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

(2) Carriers that publish tariffs under paragraph (1) of this subsection shall keep them open for public inspection. A rate contained in a tariff filed by a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of chapter 105 shall be stated in money of the United States. A tariff filed by a motor or water contract carrier or by a household goods freight forwarder providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of that chapter,

respectively, may not become effective for 30 days after it is filed.

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